No. 89-115

In The

Supreme Court of the United States

October Term, 1989

JOHN A. SCHEXNIDER
AND ALLISON SCHEXNIDER

Petitioners,

versus

McDERMOTT INTERNATIONAL, INC., McDERMOTT, INC. and INSURANCE COMPANY OF NORTH AMERICA

Respondents.

BRIEF IN OPPOSITION TO PETITIONERS WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

At the time of the accident, April 12, 1981, the Derrick Barge 21 was owned by McDermott Australia, Ltd., and was chartered to McDermott Southeast Asia Pte., Ltd., both of which are foreign corporations not conducting any business within the United States, although they are wholly owned subsidiaries of McDermott International, Inc., and McDermott, Inc. (both U.S. corporations), respectively.

On March 6, 1981, in New Orleans, Louisiana, John A. Schexnider entered into a contract of employment with McDermott International, Inc., a Panamanian corporation. The contract employed Schexnider as a material clerk, to work in the Southeast Asia area. The date of departure listed on the contract was March 14, 1981.

The flag of the Derrick Barge 21 was Australian; the DB-21 was built in Australia, had been purchased by McDermott Australia, Ltd. in 1966, and had been refitted for use in Indonesian waters. At no time had the DB-21 ever been within the territorial waters of the United States. McDermott Australia, Ltd., the Australian corporation which owned the vessel, as well as McDermott Southeast Asia, Pte., Ltd., the Singaporean corporation which had chartered the vessel to perform work in laying a pipeline in the Java Sea, are wholly owned subsidiaries of McDermott International, Inc., which is a Panamanian corporation. In turn, McDermott International, Inc., is a wholly owned subsidiary of McDermott, Inc., an American corporation.

The day-to-day operation of the DB-21 was controlled locally, i.e., by the charterer McDermott Southeast

Asia, Pte., Ltd., and to a lesser extent, the vessel owner McDermott Australia, Ltd. Furthermore, whenever the McDermott, Inc., marine equipment coordinator went to supervise the operation of the DB-21, he would be paid by McDermott Australia, Ltd., for his work just as an outside company would be paid. (Appendix H)

The operational activities of the DB-21 on the date of the plaintiff's injury had no contacts whatsoever with the United States. The vessel was originally constructed in Australia in accordance with Australian government regulations, it flew the Australian flag, it was owned by an Australian company, and it was chartered to a Singaporean company which oversaw its day-to-day operations in the Java Sea off Indonesia.

SUMMARY OF THE ARGUMENT

I. Australian law governs petitioners' action, and subsequent Fifth Circuit decisions upholding this determination should not be overturned "unless the evidence at subsequent trial was essentially different, the controlling authority has since made a contrary decision of law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *Schexnider v. McDermott International, Inc.*, 868 F.2d 717, 718, 719 (5th Cir. 1989); *White v. Murtha*, 377 F.2d 428 (5th Cir. 1967).

II. The District Court held that plaintiffs did not sustain their burden of proof, thus, the Court found no fault or condition attributable to any of the defendants or to any of INA's insureds contributed to the fall. The Fifth

Circuit correctly concluded that this finding was not clearly erroneous. *Schexnider v. McDermott International, Inc.*, 868 F.2d 717 (5th Cir. 1989).

ARGUMENT

I.

The district court's determination of Australian law governs Schexnider's action, and the subsequent Fifth Circuit decisions upholding this determination should not be overturned.

> The decision of a legal issue by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case at both the trial and appellate levels unless the evidence at subsequent trial was essentially different, the controlling authority has since made a contrary decision law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice. *Schexnider v. McDermott International, Inc.*, 868 F.2d 717, 718, 719 (5th Cir. 1989); *White v. Murtha*, 377 F.2d 428 (5th Cir. 1967).

In petitioners' Writ of Certiorari, Schexnider makes the argument that had the Court of Appeals applied new evidence to the eight-point test in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 79 L.Ed. 1254 (1953), that Australian law would not have been applied in this case. The petitioner made the same argument in their Petition for Rehearing which was denied on April 11, 1989 (Appendix G). Respondents now refer to their reply brief on this issue which is attached as Appendix E.

The petitioners did not apply new evidence to the eight-point test in *Lauritzen* as claimed. The same questions have been ruled upon by the district court and by the Fifth Circuit Court of Appeals. Judge Veron addressed each and every one of petitioner's application of the *Lauritzen* test in his ruling dated June 23, 1986 (Appendix A).

In *Schexnider v. McDermott International, Inc.*, 817 F.2d 1159 (5th Cir. 1987) rehearing and rehearing en banc denied, 824 F.2d 972 (5th Cir. 1987), the Fifth Circuit affirmed the district court's determination that Australian law applied in this case but reversed the district court's dismissal of Schexnider's suit, remanding the case to district court with instructions to the Court to retain jurisdiction and to apply Australian law to Schexnider's maritime claim (Appendix B). Respondents adopt the lower court's reasoning and determination that Australian law governs this controversy.

II.

Now, in response to petitioner's allegation that the appellate court failed to consider the volumes of documentary and deposition evidence filed subsequent to its first decision (which evidence petitioner argues clearly establishes that the affairs of McDermott Australia, Ltd., were conducted from New Orleans, Louisiana) respondents believe that this is a fact question which previously was determined by the trial judge. Judge Veron had the opportunity to see every witness who testified on every material point, with the exception of Richard Lawson, whose testimony was merely corroborative of what

others had said, and to review the exhibits submitted by both sides. It was the clear conclusion of the trial judge that the affairs of McDermott Australia, Ltd., were not conducted from 1010 Common Street, New Orleans, Louisiana.

Upon appellate review, the Fifth Circuit stated that:

> Determinations as to the credibility of witnesses are peculiarly within the province of the district court. Even if we were convinced, which we are not, that had we been sitting as the trier of fact, we would have weighed the evidence differently, our ability to reverse the district court's judgment on the basis that its findings of fact are clearly erroneous is extremely limited. As the Supreme Court said in *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985),
>
> > When a trial judge's finding is based on his decision to credit the testimony of one or two or more witnesses, each of whom has told a coherent and a facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. *id.* 470 U.S. at 575, 105 S.Ct. at 1513.
>
> *Schexnider v. McDermott International*, 868 F.2d 717, 720 (5th Cir. 1989). (Attached as Appendix F)

CONCLUSION

It is respectfully submitted that the argument presented by petitioners in their Writ of Certiorari, that Schexnider is an American seaman working for an American corporation; that Australia has no interest whatsoever in Schexnider's welfare and/or welfare of McDermott, Inc./McDermott International, Inc.; and that Australian law should not have been applied to this case has already been determined in the lower courts. The "choice of law" in this case was first established by Judge Veron's ruling upon defendant's Motion to Dismiss, dated June 23, 1986 (Appendix A) and the Fifth Circuit Court of Appeals' ruling in *Schexnider v. McDermott International, Inc.*, 817 F.2d 1159 (5th Cir. 1987) (Appendix B); and *Schexnider v. McDermott International, Inc.*, 868 F.2d 717 (5th Cir. 1989) (Appendix F). The prior decision issued by the lower court "establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case at both the trial and appellate levels unless the evidence at a subsequent trial was substantially different, the controlling authority has since made a contrary decision of law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *Schexnider, supra*, p. 719; *White, supra*, p. 431-432. Petitioners have not placed before the Court new evidence signifying a controlling authority which was made since the appellate decision, which is contrary to the decision granted by the Fifth Circuit, nor has the petitioners shown that the decision was "clearly erroneous and would work a manifest injustice." (*Schexnider, supra*, p. 719; *White, supra*, pp. 431-32). For these reasons,

respondents submit that petitioners' Writ for Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

CIVIL ACTION NO. 81-2358

JOHN A. SCHEXNIDER

VS.

McDERMOTT INTERNATIONAL, INC.,
and McDERMOTT, INC.

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
JUN 23, 1986
ROBERT H. SHEMWELL, CLERK
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JUN 24, 1986
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VERON, J.

RULING UPON DEFENDANTS' MOTION TO DISMISS

This matter is before the Court upon the motion of defendants to dismiss the plaintiff's cause of action upon the grounds of plaintiff's failure to state a cause of action upon which relief can be granted and upon the grounds of forum non conveniens. Because the Court has carefully considered matters outside of the pleadings, the motion shall be treated as one for summary judgment pursuant to Rule 56(c). *Chirinos de Alvarez v. Creole Petroleum Corp.*, 613 F.2d 1240,1244 (3d Cir. 1980); Fed R. Civ. Pro. 12(b); *see Fajardo v. Tidewater, Inc.*, 707 F.2d 858, 860 (5th Cir. 1983). In considering the motion pursuant to Rule 56, the Court has considered all of the facts and the inferences to be drawn therefrom in a light most favorable to the plaintiff.

I. FACTS

Plaintiff John A. Schexnider is an American citizen who alleges injury while serving as a crewmember of the Derrick Barge 21 ["DB 21"] on April 12, 1981, while performing work in the Java Sea off the coast of Indonesia. At the time of his accident plaintiff was working pursuant to an employment contract with McDermott,

International, Inc., a Panamanian corporation, which had been entered into in New Orleans, Louisiana on March 6, 1981 and which called for plaintiff to work "in the Southeast Asia Area."

During the plaintiff's service aboard the DB 21, the vessel flew the flag of Australia. The DB 21 was originally built in Austraila, had been purchased by McDermott Australia, Ltd. in 1966, and had been refitted for use in Indonesian waters. At no time has the DB 21 ever been within the territorial waters of the United States. At the time of the accident, the DB 21 was owned by McDermott Australia, Ltd., and was chartered to McDermott Southeast Asia, Pte., Ltd., both of which are foreign corporations not conducting any business within the United States although they are wholly owned subsidiaries of McDermott International, Inc. and McDermott Inc., respectively. After perceiving the correct posture of the parties, plaintiff moved to amend his complaint in order to name McDermott Australia, Ltd., and McDermott Southeast Asia Pte. Ltd. as party defendants, but they recently have been dismissed pursuant to Rule 4(j)[1].

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[1] Fed. R. Civ. Pro. 4(j) provides:

> (j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action *shall be* dismissed as to that defendant without prejudice upon the court's own initiative with notice to

(Continued on following page)

II. APPLICABLE LAW

A. Standard of Review

In determining the merits of defendants' motion to dismiss pursuant to the doctrine of forum non conveniens, this Court must first ascertain whether American or foreign law governs the lawsuit. If foreign law applies and the foreign forum is accessible, the Court must then determine in which forum the case should be tried. A finding that the lawsuit should be tried in the foreign forum warrants dismissal because the Court should decline to exercise jurisdiction over the dispute. *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 384, *reh. denied* 710 F.2d 207 (5th Cir. 1983).

B. Choice of Law

It is well established that this Court is to rely upon the eight *Lauritzen-Rhoditis* factors developed by the Supreme Court in making it initial determination of whether United States or foreign law applies. *See Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26

(Continued from previous page)

such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule. (Emphasis added.)

Because plaintiff failed to serve these two foreign corporations within the time period prescribed by this rule, they have been dismissed as party defendants. Counsel for defendants maintains that plaintiff was unable to obtain proper service on these corporations, *ab initio*, since they have no minimum contacts with the United States.

L.Ed.2d 252 (1970); *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953). The eight factors specified in *Lauritzen-Rhoditis* are: (1) the place of the wrongful act; (2) law of the flag; (3) allegiance or domicile of the injured seaman; (4) allegiance of the defendant shipowner; (5) the place where the contract of employment was made; (6) the accessibility of a foreign forum; (7) the law of that forum; (8) the shipowner's base of operation.

In the case at bar, several of the *Lauritzen-Rhoditis* factors are easily decided in favor of foreign law.[2]

1. Place of the Wrongful Act –

At the time of plaintiff's injury, the ship was located in the Java Sea off of the coast of Indonesia. While the Supreme Court in *Lauritzen* noted that the test of location of the wrongful act is of limited application to shipboard torts because of the varieties of legal authority over waters the ship may navigate, 345 U.S. at 583, 73 S.Ct. at 929, it is highly significant that the ship on which the injury occurred has *never* navigated the territorial waters of the United States. *See Fajardo, supra*, 707 F.2d at 861. Thus, the locality test affords no support whatsoever for the application of American law in this case. Moreover, insofar as a portion of plaintiff's unseaworthiness claim relates to the angle at which a staircase was built on the

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[2] It is well established that the *Lauritzen-Rhoditis* factors are applicable in determining jurisdiction of claims asserted under the General Maritime Law of the United States as well as under the Jones Act. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 381-84, 79 S.Ct. 468, 485-86, 3 L.Ed.2d 368 (1959); *Fajardo v. Tidewater Inc.*, 707 F.2d 858, 861 (5th Cir. 1983).

DB 21, it would be appropriate to apply the law of state where the DB 21 was constructed – Australia.

2. Law of the Flag –

The flag of the vessel aboard which the plaintiff was injured flew the flag of the country which spirited the America's Cup away from Newport, Rhode Island in 1983. Contrary to the plaintiff's assertion that the Australian flag was merely a "flag of convenience," the evidence illustrates that the ship was built according to Australian regulations and was owned by an Australian corporation.[3] The Supreme Court has recognized that the law of the flag is "the most venerable and universal rule of maritime law," which "overbears most other connecting events in determining applicable law . . . unless some heavy counterweight appears." *Lauritzen*, 345 U.S. at 584, 585-86, 73 S.Ct. at 929-30; *Rhoditis, supra*, 398 U.S. at 313, 90 S.Ct. at 1736 (Harlan, J., dissenting). As appears from the facts of this case, there are no such counterweights which favor the application of American law.

3. Allegiance or Domicile of the Injured Seaman –

The United States has an interest in seeing that its citizens not be maimed or disabled from self-support, and in seeing that its citizens who work abroad are adequately protected. It is also true that a seaman takes his employment where he can find it, and as the foreign

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[3] I.e. McDermott Australia, Ltd.

Australian forum is presumed capable of providing plaintiff a remedy for any wrong suffered, this interest will be adequately served.

4. Allegiance of the Defendant Shipowner –

The owner of the DB 21 is McDermott Australia, Ltd. an Australian corporation which exercises local control over the operations of its ships. Obviously, this factor supports the application of Australian law.

5. Place of Contract –

Plaintiff entered into his employment contract with defendant McDermott International, Inc., a Panamanian corporation, in New Orleans. The contract specifically provides, however, that the employment is to be in "the Southeast Asia Area." The Supreme Court has observed that the place of contracting for employment as a seaman is generally fortuitous. Moreover, as the Supreme Court has observed:

> The practical effect of making the *lex loci contractus* govern all tort claims during the service would be to subject a ship to a multitude of systems of law, to put some of the crew in a more advantageous position than others, and not unlikely in the long run to diminish hiring in ports of countries that take best care of their seaman. *Lauritzen, supra,* 345 U.S. at 588, 73 S.Ct. at 931.

In this instance, the plaintiff specifically contemplated working in Southeast Asia at the time he entered the contract, and it will certainly not be contrary to the

expectation of the parties to find that the law of a country in that part of the world will govern plaintiff's claims.

6. Inaccessibility of Foreign Forum –

The parties do not dispute that Australian courts are available to provide the plaintiff an adequate legal remedy.

7. The Law of the Australian Forum –

The Fifth Circuit has consistently recognized that the law of a foreign forum is to be presumed adequate "unless the plaintiff makes some showing to the contrary, or unless conditions in the forum otherwise made known to the court, plainly demonstrate that the plaintiff [] [is] highly unlikely to obtain basic justice therein." *Vaz Borralho, supra,* 696 F.2d at 393-94; *see also McClelland Engineers, Inc. v. Munusamy,* 784 F.2d 1313, 1319 (5th Cir. 1986). Plaintiff has made no such showing in this case.

8. Shipowner's Base of Operations –

While the DB 21 is owned by McDermott Australia, Ltd., and was chartered to McDermott Southeast Asia, Pte., Ltd. at the time of plaintiff's injury, plaintiff urges the Court to "look through the facade of foreign incorporation to the ownership behind" McDermott Australia, Ltd. *See Sosa v. M/V LAGO IZABAL,* 736 F.2d 1028, 1032 (5th Cir. 1984). As discussed above, McDermott Australia, Ltd., the Australian corporation which owned the vessel, as well as McDermott Southeast Asia, Pte., Ltd., the Singaporean corporation which had chartered the vessel

to perform work in laying a pipeline in the Java Sea, are wholly owned subsidiaries of McDermott International, Inc., which is a Panamanian corporation. In turn, McDermott International, Inc. is a wholly owned subsidiary of McDermott, Inc., an American corporation. Because the ultimate parent corporation, defendant McDermott, Inc., is American, the plaintiff contends that the shipowner's real base of operations is the United States. Plaintiff furthermore points out that the vessel is surveyed by a marine equipment coordinator employed by McDermott, Inc. who maintains his office New Orleans. In addition, plaintiff contends that because the defendant, Insurance Company of North America ["INA"] insures all McDermott corporations and subsidiaries, and because INA is an American corporation, that there is further justification for finding an American base of operations.

Defendants, on the other hand, cite deposition testimony which clearly shows that the day-to-day operation of the DB 21 was controlled locally, i.e., by the charterer McDermott southeast Asia, Pte., Ltd., and, to a lessor extent, the vessel owner McDermott Australia, Ltd. Furthermore, whenever the McDermott, Inc. marine equipment coordinator went to supervise the operation of the DB 21, he would be paid by McDermott Australia, Ltd. for his work just as an outside company would be paid. Deposition of Walter Hazard, p.p. 56-58.

The crux of this determination "involves the ascertainment of the facts or groups of facts which constitute contacts between the transactions involved in the case and the United States, and then deciding whether or not they are substantial." *Rhoditis, supra,* 398 U.S. at 309, n.4, 90 S.Ct. at 1734, n.4, *quoting with approval Bartholomew v.*

Universe Tank Ships, Inc., 263 F.2d 437, 441 (2d Cir.), *cert. denied* 359 U.S. 1000, 79 S.Ct. 1138, 3 L.Ed.2d 1030 (1959). It is clear from the facts of the case that the operational activities of the DB 21 on the date of the plaintiff's injury had no contacts whatsoever with the United States. The vessel was originally constructed in Australia in accordance with Australian Government regulations, it flew the Australian flag, it was owned by an Australian company, and it was chartered to a Singaporean company which oversaw its day-to-day operations in the Java Sea off Indonesia.

In order to find an American base of operations, "[t]he necessary operational contacts with the United States must relate to both the shipowner *and the ship* . . . and must be substantial." *Sosa, supra*, 736 F.2d at 1032 (emphasis added; citations omitted). Obviously, there are no substantial contacts with the Untied States, and the Court thus finds that the shipowner's base of operations is Australia. *Cf. Sosa, id.* at 1031 (where "many of the wrongful acts took place in the United States and this weigh[ed] in favor of applying American law").

The Court furthermore rejects as without merit the plaintiff's contention that the fact the Insurance Company of North America insures the Australian subsidiaries as well as other McDermott companies makes the shipowner's contacts with the United States "substantial." There is no authority whatsoever for this proposition and the Court furthermore notes that there is nothing within the law of admiralty which authorizes a direct action against a shipowners insurer. *Cf. Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485 (11th Cir. 1986) (holding that a direct action may be maintained against an insurer if the

law of the forums state so allows, but furthermore recognizing that federal admiralty law confers no general right to sue an insurance company directly.).

While the Supreme Court has recognized that the *Lauritzen-Rhoditis* factors may not be applied in a purely mechanical fashion, it is clear from a consideration of all of the facts of the case that no substantial nexus exists between the present forum and the case at bar. The most significant contacts lie in the "Land Down Under," and Australian law therefore governs the controversy.

C. Forum Non Conveniens

Having determined that Australian law applies to this action, the Court next considers whether those factors set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839 (1947), favor dismissal or retention of the case. One factor in favor of retaining jurisdiction is that the plaintiff has already deposed particular witnesses in Singapore who would not be available to compulsory process within this Court's jurisdiction. On the other hand, the Court notes that they would most likely not be subject to any compulsory process of Australian courts either. Another consideration is that plaintiff is a resident of The Western District of Louisiana – Lake Charles Division and has undergone medical treatment in the local area. While plaintiff contends that his liability experts are residents of the United States, this argument is premised upon the erroneous assumption that American law will govern the controversy. The Court has also considered the age to which this case has grown before the Court, but specifically notes that this has been due not only to

its overly congested docket but also because of requested trial continuances by counsel for the plaintiff.

Factors weighing in favor of dismissal include the complex and difficult task faced by this Court in finding and applying Australian law to the instant controversy. Following this Court's preliminary determination that Australian law would govern this case, it invited counsel to its chambers for a status conference at which time plaintiff's counsel was admonished that he faced potential dismissal of his entire suit pursuant to Rule 12(b)(6) because he had not asserted any cause of action arising under Australian law. *See Vaz Borralho, supra,* 696 F.2d at 390-91 (5th Cir. 1983); *Chiazor v. Transworld Drilling Co., Ltd.,* 648 F.2d 1015, 1020 n.7, *reh denied* 659 F.2d 1075 (5th Cir. 1981), *cert. denied* 445 U.S. 1019, 102 S.Ct. 1714, 72 L.Ed.2d 136 (1982). Rather than allege any specific cause of action arising under Australian law, however, plaintiff instead chose to amend his complaint so as to read: "In the alternative, the plaintiffs allege that if the law of the United States is not applicable to the accident of April 12, 1981, that the law of Australia and/or Indonesia and/or Singapore is applicable in all respects." Plaintiff has provided no indication whatsoever as to any specific cause of action which he may have under Australian law and this Court currently sits without an inkling as to the content of the law which it will be required to apply. In this vein, the Court has no idea whether or not plaintiff in entitled to a jury trial and it sits in the dark as to how the matter should proceed under the governing Australian law.

Another significant factor favoring dismissal is the unavailability of any remedy which the plaintiff may have against McDermott Southeast Asia, Pte., Ltd. and/

or McDermott Australia, Ltd. in this court. As previously noted, the plaintiff was unable to secure service upon those companies within the time period prescribed by Federal Rule of Civil Procedure 4(j) and his action against them consequently has been dismissed without prejudice. Certainly, McDermott Australia, Ltd. is subject to the jurisdiction of Australian courts and it has furthermore been represented that McDermott Southeast Asia, Pte., Ltd., having entered into the DB 21 charterparty with McDermott Australia, Ltd., would have the requisite minimal contacts with Australia to be subject to its jurisdiction. Certainly, the absence of the vessel owner and charterer from the lawsuit is a highly significant consideration, and serves to strongly tip the scale in favor of dismissal.

Factors of public interest also favor dismissal of the action. As noted by the Supreme Court in *Gilbert:* "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin." *Gilbert, supra,* 330 U.S. at 508, 67 S.Ct. at 843. Certainly, plaintiff's action cannot be said to have originated in the Western District of Louisiana. Moreover, the plaintiff seeks a trial by jury and, while the Court is unsure of whether he would be entitled to one under Australian law, this Federal District Court has been directed by the Administrative Office of the United States Courts that all civil jury trials must be suspended through the end of the fiscal year or until additional funds are made available, as a result of, inter alia, the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act. In addition, there is no way in which this case could be considered to be "a localized

controversy" in which the citizens of the community would have any interests whatsoever. As such, the Court finds that the *Gilbert* factors strongly favor dismissal of the action.

Accordingly the Court determines that dismissal on the grounds of forum non conveniens is warranted, provided that the defendants: (1) agree to submit to the jurisdiction of Australian Courts and submit to service of process in an appropriate Australian court within sixty (60) days of the date of this order; (2) agree to wave all statute of limitations and laches defenses; (3) agree to satisfy any judgment rendered by the Australian courts; and (4) agree that any and all depositions taken in the present matter shall be admissible as evidence for consideration by the Australian court should defendants fail to meet any of these conditions, this Court will resume jurisdiction over the case.

THUS DONE AND SIGNED at Lake Charles, Louisiana, this 23rd day of June, 1986.

s/s Earl E. Vernon
EARL E. VERNON
UNITED STATES DISTRICT JUDGE

APPENDIX B

John A. SCHEXNIDER,
Plaintiff-Appellant,

v.

McDERMOTT INTERNATIONAL, INC.,
et al., Defendants-Appellees.

No. 86-4506.

United States Court of Appeals,
Fifth Circuit.

May 29, 1987.

Rehearing and Rehearing En Banc
Denied July 15, 1987.

American seaman brought action against Australian shipowner and charterer for injuries sustained on board ship. The United States District Court for the Western District of Louisiana, Earl E. Veron, J., dismissed suit, and seaman appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) Australian law, and not American law, applied where law of flag was Australian, ship was built in Australia according to Australian standards, and Australian courts and law were available to provide relief, and (2) dismissal on forum non conveniens grounds was abuse of discretion where trial in Australia would be hardship to seaman, and Australian defendants were ready and able to have case tried in Louisiana.

Affirmed in part, reversed in part and remanded.

1. **Federal Courts 776**

District court's choice-of-law determination is subject to de novo review by Court of Appeals.

2. **Federal Courts 45, 818**

District court's forum non conveniens determination is committed to sound discretion of district court, and may be reversed only if district court's decision constitutes clear abuse of discretion.

3. **Seamen 3**

Australian law, and not American law, applied to American seaman's maritime action against Australian shipowner and charterer, even though employment contract was made in United States, where ship on which accident occurred flew Australian flag, Australian courts were accessible to provide relief, and ship was built in Australia in accordance with Australian standards.

4. **Federal Courts 105**

There is ordinarily strong presumption in favor of plaintiff's choice of forum that may be overcome only when private and public interest factors clearly point towards trial in alternative forum.

5. **Federal Courts 45**

Dismissal of American seaman's maritime claim against Australian shipowner on forum non conveniens grounds was abuse of discretion, even if court would

have difficulty determining applicable Australian law, where trial in Australia would be hardship to seaman, shipowner was ready and able to try case in Louisiana, and extensive pretrial discovery and proceedings had already taken place over five-year period.

6. Federal Courts 45

Need to apply foreign law is not in itself reason to apply doctrine of forum non conveniens.

Joseph J. Weigand, Jr., Houma, La., for plaintiff-appellant.

James B. Doyle, Henry E. Yoes, III and Edmund E. Woodley, Lake Charles, La., for defendants-appellees.

Appeal from the United States District Court for the Western District of Louisiana.

Before POLITZ, JOLLY and HIGGINBOTHAM, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

John Schexnider appeals from the district court's dismissal of his suit against the appellees on *forum non conveniens* grounds. Although we agree with the district court that Australian rather than United States law governs this maritime action, we conclude that the district court did not act within its discretion when it dismissed Schexnider's suit for *forum non conveniens* reasons.

I

The appellant, John A. Schexnider, is an American citizen. He alleges an injury, occurring on April 12, 1981, while serving as a crewmember of the Derrick Barge 21 (DB), which was performing work in the Java Sea off the coast of Indonesia. At the time of his accident, Schexnider was working pursuant to an employment contract with McDermott International, Inc., a Panamanian corporation. On March 6, 1981, in New Orleans, Schexnider had entered into the contract that called for him to work "in the Southeast Asia area."

During Schexnider's service aboard the DB, the vessel flew the Australian flag. The DB was built in Australia, had been purchased by McDermott Australia, Ltd. in 1966, and had been refitted for use in Indonesian waters. At no time had the DB ever been within the territorial waters of the United States. At the time of the accident the DB was owned by McDermott Australia, Ltd., and was chartered to McDermott Southeast Asia, Pte., Ltd., both of which are foreign corporations not conducting any business within the United States, although they are wholly owned subsidiaries of McDermott International Inc., and McDermott, Inc. (both U.S. corporations), respectively. After perceiving the correct posture of the parties, Schexnider moved to amend his complaint in order to name McDermott Australia, Ltd., and McDermott Southeast Asia, Pte., Ltd., as party defendants, but they were dismissed pursuant to Rule 4(j) of the Federal Rules of Civil Procedure.

II

On December 28, 1981, Schexnider filed his seaman's complaint against McDermott International, Inc., and McDermott, Inc., (McDermott) pursuant to the Merchant Marine Act of 1920, 46 U.S.C. § 688, better known as the Jones Act, and general maritime law. Schexnider alleged that he was injured in a slip and fall accident on April 12, 1981, while working on the DB. In its answer McDermott admitted ownership of the DB. On June 18, 1982, Schexnider filed an amended complaint to add his wife as a plaintiff.

Pretrial proceedings and discovery followed. A trial date was set on several occasions but in each instance the trial was postponed. In April 1986, the defendants moved to dismiss on choice-of-law and *forum non conveniens* grounds. This motion was granted by the district court in an opinion dated June 23. The court found that Australian law governed the case, and dismissed the case as to the remaining defendants, conditioned upon the defendants agreeing to submit to the jurisdiction of Australian courts and its service of process within sixty days of the date of the order, agreeing to waive all statute-of-limitations and laches defenses, agreeing to satisfy any judgment rendered by the Australian courts, and agreeing that any and all depositions taken in the present matter would be admissible as evidence in the Australian courts.

By pleading of July 7, 1986, McDermott, Inc., McDermott International, Inc. and INA agreed to the terms and conditions specified in the judgment. Schexnider filed a motion to stay and a notice of appeal on July 17.

III

[1,2] Resolution of this appeal requires us to determine whether the district court abused its discretion by dismissing Schexnider's suit on *forum non conveniens* grounds. First the court determines that United States law does not apply, and then the court balances public and private convenience factors set forth in judicial precedent to determine whether to dismiss the case. While the district court's choice-of-law determination is subject to *de novo* review by the court of appeals, *Bailey v. Dolphin International, Inc.*, 697 F.2d 1268, 1274 (5th Cir. 1983), the *forum nom conveniens* determination (i.e., the balancing of public and private factors) is committed to the sound discretion of the district court. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S.Ct. 252, 266, 70 L.Ed.2d 419 (1981). We may reverse a district court's decision on a motion to dismiss based on *forum non conveniens* only if its action constitutes a clear abuse of discretion. *Piper*, 454 U.S. at 257, 102 S.Ct. at 266-67; *Bailey*, 697 F.2d at 1274.

[3] The district court correctly determined that Australian law applied to Schexnider's suit. The determination of the law governing this maritime action is made pursuant to a multifactored analysis set out in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), and further elaborated in *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970) (these factors have become known as the *Lauritzen-Rhoditis* factors). They are:

1. the place of the wrongful act;

2. the law of the flag;

3. the allegiance or domicile of the injured seaman;
4. the allegiance of the defendant shipowner;
5. the place where the contract was made;
6. the accessibility of the foreign forum;
7. the law of the forum;
8. the base of operations.

See Rhoditis, 398 U.S. at 308-09, 90 S.Ct. at 1733-34. The significance of these factors must be considered in the light of the national interest to be served by assertion of Jones Act jurisdiction. *Id.* at 309, 90 S.Ct. at 1734. In this case, the district court concluded that the application of these factors weighed in favor of applying Australian law. While the court found that the domicile of the injured party was in the United States, and his employment contract was made in the United States, the other factors favored applying Australian law. The district court found that the ship on which the accident occurred flew the Australian flag, the allegiance of the defendant shipowner was Australian, Australian courts were accessible to provide relief, Australian law was presumed adequate since the plaintiff had not shown otherwise, and the shipowner's base of operations was abroad. The district court also found that the ship was never intended to and never did sail in American waters, and that while the plaintiff did sign on for work in this country, the employment contract specifically provided that employment was for the "Southeast Asia area."

Of particular significance in this case is the fact that the ship on which Schexnider was injured flew the Australian flag. The law of the flag is given *great* weight in

determining the law to be applied in maritime cases. As the Supreme Court has held, the law of the flag is "the most venerable and universal rule of maritime law," which "overbears most other connecting events in determining applicable law . . . unless some heavy counterweight appears." *Lauritzen*, 345 U.S. at 584, 73 S.Ct. at 929. The district court found that under the facts of this case, heavy counterweights which favored applying American law did not exist. We agree.

Furthermore, a related consideration is that the DB was built in Australia, and in accordance with Australian standards. This clearly favors the application of Australian law since part of Schexnider's unseaworthiness claim relates to the way in which the staircase was built on the DB. In addition, the district court presumed, without challenge, that the Australian courts would be available and adequate for the litigation of this case. The principal factor favoring the application of American law is the fact that Schexnider is a United States citizen. But this is not sufficient to outweigh the factors favoring the application of Australian law, especially the law of the flag. Schexnider also argues that the fact that the ultimate parent corporation (the DB is owned by a subsidiary of a subsidiary), McDermott, Inc., is an American corporation, militates in favor of applying American law. But we do not regard as significant the fact that McDermott, Inc. is an American corporation given the fact that the day-to-day operations of the vessel were, according to the district court, controlled by McDermott's Southeast Asian and Australian subsidiaries.

The preponderance of the *Lauritzen-Rhoditis* factors clearly favors the application of Australian law. First, and

perhaps most important, the law of the flag is Australian. Furthermore, the DB was built in Australia according to Australian standards, the day-to-day operations of the DB were governed in part by an Australian subsidiary of Mcdermott, and Australian courts and law are available to provide relief. By way of contrast only the fact that Schexnider is a United States citizen clearly favors the application of American law. Given the heavy balance in favor of applying Australian law, we agree with the district court that Australian law governs Schexnider's lawsuit.

IV

We do, however, find that the district court abused its discretion when it dismissed Schexnider's suit on *forum non conveniens* grounds. The determination whether an action should be dismissed on *forum non conveniens* grounds involves a balancing of public and private interest factors as set out by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947):

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility [sic] of a judgment if one is

> obtained. The court will weight relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
>
> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

330 U.S. at 508-509, 67 S.Ct. at 843.

[4, 5] Although it is true that an appellate court may reverse a district court's *forum non conveniens* determination only where there has been a clear abuse of the district court's discretion, *Piper*, 454 U.S. at 257, 102 S.Ct. at 266-67, it is also true that there is ordinarily a strong presumption in favor of the plaintiff's choice of forum that may be overcome only when the private and public

interest factors clearly point towards trial in the alternative forum. *Id.* at 255, 102 S.Ct. at 265-66.[1] In this case the private and public interest factors do not point clearly toward trial in Australia.

Trial in Lake Charles, Louisiana, is clearly convenient for the plaintiff, who is a citizen and resident, especially when many of the plaintiff's witnesses are also in this country. Moreover, a trial in Australia would in all likelihood be a hardship to Schexnider who is apparently not in good health. By way of contrast, the appellees have not shown that a trial in Lake Charles would greatly inconvenience them. From the record, we observe that the appellees were apparently ready and able to have their case tried in Lake Charles. At least in a few instances, the trial date in this case was reset on Schexnider's motion, not the appellees'. We thus conclude that the private interest factors clearly point in favor of having this case tried in the United States.

The district court concluded that factors of public interest favored trial in Australia. The district court cited "Gramm-Rudman" problems (federal court budgetary difficulties) and the lack of local interest in this type of case. The Gramm-Rudman emergency, as it relates to funding of federal trials, has subsided. Lack of public

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[1] Schexnider makes much of the fact that he is an American citizen. A citizen's forum choice should not be given dispositive weight, however. *Piper*, 454 U.S. at 256 n. 23, 102 S.Ct. at 266 n. 23. This court has held that a court does not abuse its discretion by not heavily weighting this factor. *Pacific Employees Ins. Co. v. M/V Capt. W.D. Cargill*, 751 F.2d 801, 806 (5th Cir. 1985).

interest in Schexnider's case would constitute a weightier objection if the litigation of this case were still in its preliminary stages. But extensive pretrial discovery and proceedings have already taken place over a period of some five years. A trial date has been set several times. Given the extensive nature of the pretrial preparation, a trial in Lake Charles would not burden the district court significantly more than it has already been burdened. Although the local community will be inconvenienced by being pressed into jury duty, the imposition of jury duty is mitigated by the considerations that Schexnider is a citizen of the community and that the trial is not likely to be lengthy.

[6] The district court's principal objection to trying this case in the United States was the difficulty that would be involved in applying Australian law. Although this certainly is a factor weighing in favor of trying the case in Australia, the need to apply foreign law is not in itself reason to apply the doctrine of *forum non conveniens*. *Piper*, 454 U.S. at 260 n. 29, 102 S.Ct. at 268 n. 29; *Manu Intern. S.A. v. Avon Products, Inc.*, 641 F.2d 62, 63 (2d Cir.1981). As the Second Circuit noted in *Manu*: "We must guard against an excessive reluctance to undertake the task of deciding foreign law, a chore federal courts must often perform." 641 F.2d at 68.

Because the factors pointing against the strong presumption in favor of the plaintiff's choice of forum in this case are slight, we conclude that the district court abused its discretion by dismissing Schexnider's suit.

V

For the reasons discussed in this opinion, we affirm the district court's determination that Australian law applies in this case. However, we also reverse the district court's dismissal of Schexnider's suit against the appellees. This case is therefore remanded to the district court with instructions to retain jurisdiction and to apply Australian law to Schexnider's maritime claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX C

UNITED STATES COURT OF APPEALS

Fifth Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure;
Local Fifth Circuit Rule 35)

Group 1 – Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2 – Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3 – Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Title	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1			
U.S. v. May	86-4615	7/13/87	S.D.Miss., 819 F.2d 531
Pounds Photographic Labs, Inc. v. Noritsu America Corp	86-1340	7/16/87	W.D.Tex., 818 F.2d 1219
Schexnider v. McDermott Intern. Inc	86-4506	7/15/87	W.D.La., 817 F.2d 1159
U.S. v. Mize	86-2353	7/14/87	S.D.Tex., 820 F.2d 118

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

JOHN A. SCHEXNIDER, ET UX	:	
VS.	:	CIVIL ACTION NO. 81-2358-LC
MCDERMOTT INTERNATIONAL, INC., ET AL	:	(Judge Veron)
	:	(Filed AUG 22 1988)

FOR THE PLAINTIFF	Joseph J. Weigand, Jr. Weigand, Weigand & Meyer P. O. Box 6062 Houma, LA 70361
	Nick Pizzolatto, Jr. Caskey & Pizzolatto P. O. Box 1052 Lake Charles, LA 70602
FOR THE DEFENDANTS	Edmund E. Woodley James B. Doyle Woodley, Williams, Fenet, Palmer, Doyle & Norman P. O. Drawer EE Lake Charles, LA 70602

VERON, J.

O P I N I O N

This controversy arises out of a seaman's slip-and-fall incident on board a derrick barge in the Java Sea off the coast of Indonesia. The seaman, John A. Schexnider

seeks various elements of damages and his wife Allison Schexnider is also a plaintiff in a loss of consortium claim. Defendants as of trial were McDermott International, Inc. which was Mr. Schexnider's employer at the time of the incident, McDermott, Inc. and Insurance Company of North America (INA), the liability insurer of both defendant corporations. The matter was tried to the court sitting in admiralty on July 18 through July 21, 1988.

BACKGROUND

The plaintiff first filed his complaint on December 28, 1981 alleging that on April 12, 1981 he slipped on grease or hydraulic fluid allowed to accumulate on a step of a stairway on the Derrick Barge 21 (DB21) aboard which, as storeman, he was a crewmember. The fall was alleged to have caused serious injuries.

The claim as to Mr. Schexnider was originally styled as being under the Merchant Marine Act of 1920 (the Jones Act)[1] and the general maritime law of the United States, specifically unseaworthiness and claims related to maintenance and cure. Subsequently this court held that the plaintiff's[2] claim was governed by the law of Australia, and dismissed on *forum non conveniens* grounds.[3] The plaintiff appealed, and the Fifth Circuit affirmed as to choice of law but reversed as to the *forum non conveniens* dismissal and remanded the case for trial of Mr. Schexnider's maritime claim according to Australian law.[4]

In other rulings this court has held, *inter alia*, that the claims against the McDermott defendants are within the court's admiralty and maritime jurisdiction under 28 U.S.C. §1333,[5] that the Louisiana Direct Action Statute[6]

applies to the actions against INA which are pendent as to claim and party,[7] and that the court lacked in personam jurisdiction over J. Ray McDermott Australia Pty., Ltd., an Australian corporation, and McDermott Southeast Asia Pte., Ltd., a Singaporean corporation.[8] The two latter corporations are the owner and demise charterer, respectively, of the DB 21. The effect of the latter two rulings is that although the Australian and Singaporean McDermott subsidiaries would not be parties, the plaintiff would have the opportunity to litigate their fault against INA in the Direct Action subject to any applicable deductible, limit or exclusion.

McDermott International, Inc. is a Panamanian corporation which is the parent corporation of McDermott, Inc. and which now has its principal business office in New Orleans, Louisiana. In 1981 McDermott, Inc. was the parent and McDermott International, Inc. was the subsidiary. The latter then had its principal business office in Brussels, Belgium.

The parties agree that under Australian law the basic cause of action is in ordinary common law negligence, with the plaintiff bearing the burden of proof by a preponderance of the evidence. The plaintiff has also alleged a cause of action for breach of an implied warranty to provide a safe place to work based on his contract of employment with McDermott International, Inc.[9] The questions of what law would govern such a claim and whether the claim actually lies are reserved until after the findings on causation.

ANALYSIS OF FACTS

As storeman aboard the DB 21, the plaintiff occupied an indoor work space below deck. This office was at the top of the ship's ladder, or stairway, which descended eight steps or treads to a landing and then four more treads to the machine shop, adjacent to which was another supply room. On the morning of April 12, 1981 deck supervisor John Rutledge, Jr. came to the plaintiff's work station and requested a new hard hat and safety gloves. As these items were kept in the downstairs supply room, Schexnider took his keys in his right hand and started down the stairs. Rutledge followed immediately behind him.

Schexnider descended in his customary manner which was to hold onto the left handrail but not the right one, and step down with his left foot, then bring his right foot down to the same tread before stepping off again with his left foot. He did so slowly and deliberately. This one-at-a-time method is understandable since he was obese and had recently undergone back surgery which was only partially successful following removal of a spinal tumor.

Having reached the landing, Schexnider began to descend the remaining four steps in the same manner. His recollection and that of Rutledge differ as to what followed.

According to Schexnider, he started down the second flight of four treads with his left hand on the rail. Once both feet were on the first tread below the landing he stepped off again, probably with his left foot, and at that time his other foot slipped forward out from under him

and his left hand released the rail. He landed in a sitting position and bounced or scooted down the steps, coming to rest on a lower step with his feet on the floor.

According to Rutledge, the plaintiff had a good grip on the left handrail when he started down the second flight. When both feet were on the first tread, he appeared to just sit down slowly, but somewhat harder than a person would seat himself on a dining room chair. At the same time he held his right hand out, palm down, as if to catch himself, and released the left handrail. He then turned to the right and rolled, coming to rest seated on the next step, i.e., second from the landing and third from the floor, with his feet on the floor, and began shouting in pain.

The plaintiff testified that after he fell he looked at the first step and saw hydraulic fluid or an oily substance in the place where he slipped. In his deposition he described it as a pool of hydraulic fluid on the checker plate or textured sheet metal surface of the tread. However, at trial the evidence established that at the time the treads were made of expanded metal, which is sheet metal perforated and stretched out to form a grating with diamond-shaped openings. The expansion of the sheet metal causes edges to turn up where the diamond shapes intersect, thus forming a good non-skid surface with openings which would not allow foreign substances to collect, and which would scrape sand and dirt tracked from the deck through the holes to the underside of the step.

At trial the plaintiff agreed that the steps were expanded metal, but maintained that hydraulic fluid on

the top step caused him to slip and fall. He attributed the presence of hydraulic fluid to ongoing installation of hydraulic pumps for a tension machine, used in the barge's pipeline-laying tasks, in the MECO room adjacent to the landing between the flights of stairs. The MECO room was a space which also housed ocean water desalinization equipment. Installation of the tension machine pump in that location involved placement of hydraulic lines through the bulkhead of the MECO room at ceiling level and over the area of the stairway landing. However, the court finds that the tension machine installation was completed no later than April 10, 1981, two days before the accident. Leak testing was done not by filling the lines with costly hydraulic fluid, but with diesel fuel. Any leaks discovered in this fashion were eliminated before hydraulic fluid went into the lines.

Rutledge had used the steps several times previously that morning and had seen no foreign substance on them. He saw no oil, grease, hydraulic fluid or other slippery substance on the stairs.upon inspecting them immediately after the accident. The plaintiff himself had used the stairs earlier that morning and had seen none. While sand or dirt could have been tracked onto the stairs from the deck, the work being done did not involve grease or oil on deck, and these would not have come to be on the stairs in this way. Sand or dirt on the stair would not have caused the plaintiff to fall. Only the plaintiff testified to an oily substance being on the stair. First Engineer George Renninger, an American, went below to check the stairs for oil shortly after the accident upon hearing reports originating with Schexnider that oil was on the step. He found none.

The stairs descended to the barge's machine shop which was under the supervision of Chief Engineer Frank Ward, an Australian. Ward had a reputation as an exceedingly meticulous taskmaster in regard to the cleanliness of his machine shop at all times. Both Rutledge and Renninger responded to the effect that it was an understatement to say that Ward's routines for cleaning the machine shop were thorough. Renninger described Ward's helpers as cleaning the area, including the stairs, constantly from one end to the other. He testified that the policy with spills of hydraulic fluid or other oily substances was to clean them up immediately without exception because of the hazard. Rutledge testified that chains and equipment pertaining to Ward's machine shop were stored directly beneath the stairway in question, and that these were remarkably clean, based on Rutledge's not inconsiderable experience as a seaman in the oil service industry.

Ward testified that rags and sacks were provided and kept handy for wiping off boots to prevent passageways from being tracked up. When passageways became messy, work was stopped to address cleanup. He added that he went up and down the stairs around thirty times a day and never found them to be slippery, and that Schexnider used the stairs more than anyone. There was adequate lighting over the stairway at all times.

Both Schexnider and Ward testified that the treads of the stairway were slightly dented. This was due to a heavy object being dragged down the stairs to the machine shop. This condition was so unpronounced that others including Rutledge had never noticed it. From either Rutledge's or Schexnider's description of the fall,

this slightly dented condition of the treads did not contribute to the accident.

Marine surveyor and Marine engineer Captain Rudy Vorenkamp testified in regard to the design of the stairway or "ship ladder." Captain Vorenkamp lived and worked for three years in Australia where he built semi-submersible rigs under constant dealings with the Australian Transport Authority. He testified that in 1981 no applicable Australian regulations addressed the angle of ladders in machinery space or elsewhere. He noted that where, as here, the ladder is in machinery space, the arrangement of necessary machinery is the first consideration and the ladder is placed in whatever space is left over.

The deposition transcript of Walter R. Hazard, a marine engineer employed by defendant McDermott, Inc. is in evidence. The court acknowledges his expertise in the field of marine engineering and design. He stated that the angle of the stairway in question is approximately 51 degrees. The United States Coast Guard regulations, to which the Australian DB21 are not subject, allow a maximum angle of 50 degrees in machinery spaces. Under currently applicable Australian regulations a stairway may have an angle of up to 70 degrees, and in machinery spaces, up to 90 degrees, i.e., vertical.

Captain Vorenkamp observed that where a ship's ladder is between 40 and 60 degrees the user faces a dilemma whether to go down forward or to turn around and descend backward. It is a matter of personal choice. He also observed that even a ladder with considerable angle to it can become steep or vertical when the vessel

rolls. From the photographs,[10] it appears that the angle of the stairs presented no unreasonable hazard to descent facing forward. All other crew members having occasion to use them did so easily in a forward position with or without using handrails. The treads were wide enough to accommodate essentially the entire length of a man's foot.

CONCLUSIONS

Schexnider's method of descending the stairs, slowly, deliberately, and one at a time while holding the rail was the safest method of forward descent and would minimize any possibility that the angle of the stairs or the slight indentations in the treads would have caused the fall. The court is not persuaded that any condition of the stairs or any other appurtenance of the vessel contributed to the plaintiff's accident. Nor is the court persuaded that any foreign substance was on the stairs or played a part in causing the fall. The cause of the fall remains a puzzlement, as the court cannot discern how, after both of the plaintiff's feet were on the top step and he was, for a split second, stopped, his right foot came to fly out from under him when he stepped off with his left. The plaintiff bore the burden of proof in this action, and he has not sustained it. The court finds that no fault or condition attributable to any of the defendants or to any of INA's insureds contributed to the fall.

Accordingly, Mr. Schexnider can be awarded no recovery under either a negligence or warranty theory. Since Mrs. Schexnider's loss of consortium claim depends on the defendants having liability for her husband's

injury, regardless of what law applies that claim must also be dismissed.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 22nd day of August, 1988.

/s/ Earl E. Veron
EARL E. VERON
UNITED STATES DISTRICT JUDGE

FOOTNOTES

[1] 46 U.S.C. §688.

[2] Most rulings in this case, including that of the court of appeals, see n. 4 *infra*, refer only to Mr. Schexnider's claim. Insofar as rulings concerning the applicability of the Jones Act or the general maritime law of the United States pertain to the injury, they govern Mrs. Schexnider's loss of consortium claim as well. This opinion will continue to refer to plaintiff in the singular, meaning Mr. Schexnider.

[3] Ruling on Defendant's Motion to Dismiss, record document no. 155, June 23, 1986.

[4] *Schexnider v. McDermott International, Inc.*, 817 F.2d 1159 (5th Cir. 1987). According to defense counsel, a defense petition to the Supreme Court was voluntarily dismissed after the plaintiff did not apply for writs within the delay period. However, the case is reported as *cert. denied, McDermott, Inc. v. Schexnider*, 108 S.Ct. 488 (1987).

[5] Ruling on Motion to Dismiss for Lack of Subject Matter Jurisdiction, record document no. 178, May 23, 1988. The essence of the ruling is that regardless of the substantive law chosen, since the action involves a seaman's injury on shipboard on the high seas, both maritime *nexus* and *locus* are present so as to confer admiralty jurisdiction. *Accord, Exxon*

Corp. v. Chick Kam Choo, 817 F.2d 307, 311 (5th Cir. 1987) (choice of Singaporean law did not deprive the federal court of admiralty jurisdiction). The defendants have now re-urged their position that since Australian land-based tort law governs the slip-and-fall, the case is not maritime and therefore admiralty jurisdiction is lacking. It suffices to say that the prior jurisdictional ruling is now the law of the case. Since the ruling of May 23, 1988 the court has learned that the reason Australian land-based law governs the alleged tort is that Australia has no substantive body of maritime law. However, an Australian court would exercise maritime subject matter jurisdiction over the claim.

A couple of other matters related to jurisdiction and mode of trial should be noted here. Diversity jurisdiction is lacking since McDermott, Inc. has its principal place of business in Louisiana and the Schexniders are Louisiana citizens as well. The plaintiff had demanded jury trial at first under the Jones Act and subsequently due to the fact that in Australia the substantive right of action is an action at law. While agreeing with defendants that, in this case under the court's admiralty jurisdiction, the plaintiff had no right to trial by jury, the court cautiously ordered a dual bench and jury trial to increase the chance of an appeal resulting in final relief. Ruling on Motion to strike Jury Demand, record document no. 185, June 8, 1988.

In a minute entry of January 22, 1986 (record document no. 92) the court ruled that since a felony conviction of the plaintiff was over ten years old and did not bear directly on his truthfulness or untruthfulness, it would not be admissible for impeachment but would be admissible in the damages phase as a consequence of the plaintiff's failure to reveal the conviction, and his concealment of time served, on his overseas employment application. On the morning of the first day of trial the plaintiff waived the jury. At the same time he waived his objections to introduction of the old felony conviction.

[6] La. Rev. Stat. 22:655 (West 1978). The statute was amended by La. Act No. 934, July 11, 1988, effective September 9, 1988 to require joinder of the insured, so the statute's popular name may become an obsolete.

[7] *Schexnider v. McDermott International, Inc.*, ___ F.Supp.

___, 1988 Westlaw 70602 (W.D. La.). In post trial memoranda the defendants raise a new argument that no Direct Action may be maintained because issuance of the liability policy via the Houston insurance agency of Adams & Porter resulted in delivery in Texas. The Direct Action ruling, *id.*, is the law of the case. The court would now add only that "delivery" in La. Rev. Stat. 22:655 is with reference to the insured who ultimately receives the policy, as opposed to the insurance agent through whom liability coverage is purchased, and that the court's ruling on this issue does no violence to the Louisiana Supreme Court's decision in *Esteve v. Allstate Insurance Co.*, 351 So.2d 117 (La. 1977) where there was no holding that delivery occurred in Louisiana nor any facts to support such a holding.

[8] Ruling on Defendants' Motions to Dismiss and Motions to Strike, record document no. 223, July 15, 1988.

[9] The defendants have responded to this claim on the merits, both as to choice of law and substantively. The warranty action was not asserted in this form until the Sixth Supplemental and Amended Complaint filed June 14, 1988. However, from the first filing on December 28, 1981, the plaintiff had asserted breach of the implied warranty of seaworthiness which runs in favor a seaman under American maritime law. This court's choice of Australian law was affirmed on May 29, 1987, see n. 4 *supra*, and the American maritime claims were not ordered stricken until July 15, 1988 after the last amendment of the complaint, see Ruling, n. 8 *supra*. For these reasons the court considers the defendants adequately on notice of an asserted cause of action under a warranty strict liability theory.

[10] The treads in the photographs are new, being made of checker plate, but the angle of the stairway is essentially the same.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

JOHN A. SCHEXNIDER, ET UX	:	
VS.	:	CIVIL ACTION NO. 81-2358-LC
MCDERMOTT INTERNATIONAL, INC., ET AL	:	(Judge Veron)
	:	(Filed AUG 22 1988)

J U D G M E N T

For written reasons assigned this date;

IT IS ORDERED, ADJUDGED AND DECREED that all claims of the plaintiffs JOHN A. SCHEXNIDER and ALLISON SCHEXNIDER against the defendants, McDERMOTT INTERNATIONAL, INC., McDERMOTT, INC. and INSURANCE COMPANY OF NORTH AMERICA be DISMISSED with prejudice and that judgment be entered herein in favor of the defendants and against the plaintiffs.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 22nd day of August, 1988.

/s/ Earl E. Veron
EARL E. VERON
UNITED STATES DISTRICT COURT

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-4667

JOHN A. SCHEXNIDER AND
ALLISON SCHEXNIDER

Plaintiffs-Appellants

VERSUS

MCDERMOTT INTERNATIONAL, INC., ET AL

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF LOUISIANA

REPLY BRIEF ON BEHALF OF
DEFENDANTS-APPELLEES
MCDERMOTT INTERNATIONAL, INC.

RESPECTFULLY SUBMITTED:

JAMES B. DOYLE
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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-4667

JOHN A. SCHEXNIDER AND
ALLISON SCHEXNIDER
Plaintiffs-Appellants

VERSUS

MCDERMOTT INTERNATIONAL, INC., ET AL
Defendants-Appellees

CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel for defendants certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judge or this Court may evaluate possible disqualification or recusal.

John A. and Allison Schexnider

McDermott International, Inc.

McDermott, Inc.

Insurance Company of North America

James B. Doyle
Edmund E. Woodley, of the law firm of
Woodley, Williams, Fenet,
Palmer, Doyle & Norman
P. O. Drawer EE
Lake Charles, LA 70602

Joseph J. Weigand, Jr., of the law firm of
Weigand, Weigand & Meyer
P. O. Box 6062
Houma, LA 70361

STATEMENT REGARDING ORAL ARGUMENT

Because the issues remaining for consideration in this case are limited to those involving the trial Court's factual determinations, defendants do not think oral argument is required.

STATEMENT OF JURISDICTION

Jurisdiction of this Honorable Court is founded pursuant to 28 USC 1991, an appeal from a final judgment of a District Court.

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STATEMENT OF THE CASE

Plaintiff John Schexnider had become a victim of the decline in the oilfield business in 1980, when he was laid off from McDermott after having been employed by that company since 1974. Through an aggressive job search program, he located a position, at lesser salary, in the West Africa division of the company, and was sent for a company physical after executing a contract with McDermott, International, Inc.

This examination, conducted in September, 1980, revealed an extensive tumor in Schexnider's low back which was ultimately removed by his neurosurgeon, Dr. Dean Moore. Because of the nature of the surgery, which required a three-level, wide decompressive laminectomy, Schexnider had, at that stage, "at leaset 30 percent" disability rating to the body as a whole (Tr., Vol. II, pp. 221-223; 239-240).

Schexnider continued to apply for positions overseas with McDermott, but did not seek stateside employment, nor did he attempt employment with any other company. This reluctance was due, in part, to Schexnider's criminal record, which he had failed to disclose to McDermott at the inception of his employment, and which would have disqualified him from overseas work with that company, had the truth been known (Tr., Vol. III, p. 498; 527).

After a worldwide job search, and after personal telephone calls made by Schexnider to Mike Buckley, personnel manager for McDermott Southeast Asia Pte., Ltd., Schexnider found employment as a barge clerk, working offshore, without family status (Tr., Vol. III, p. 527). As compared to his former position, that of a traffic

supervisor in the Middle East area for McDermott International, Inc., the job finally obtained by Schexnider was the lowest-paying job available to American expatriates in the company. Buckley, an experienced personnel manager, believed at the time Schexnider was "desperate" for work since, when the two had worked together in the Middle East, they had been "on the same level," in Buckley's words. (Tr., Vol. IV., pp. 737-40)

Schexnider reported for work aboard the Derrick Barge DB-21, owned by J. Ray McDermott Australia Pty., Ltd., chartered to McDermott Southeast Asia Pte., Ltd., and under the supervision of employees of McDermott International, Inc., on the 19th of March, 1981. At the time of his arrival, the superintendent of the barge was Ron Carl, and other westerners on board included Chief Engineers Frank Ward and Richard Lawson; assistant engineer George Renninger; crane operator John Rutledge; electrician Jackie Whitchard; and electrician Ronald Scoles, all of whom testified on behalf of defendants in this case.

The testimony of these western expatriates, who were in close confinement, working offshore, for long stretches, makes it clear that Schexnider was very displeased with the state in which he found himself, and was looking for a way out (Tr., Vol. IV, pp. 733-737; 863-865). Specifically, he didn't like offshore work; missed his family, particularly his wife, who was six months pregnant and raising three children under age six by herself; and was eager to find a solution to his problem, even if it meant taking drastic measures.

On April 12, 1981, Schexnider reported to his supervisors that he had fallen down on the stairway leading

from his office to the machine shop, a passageway he traversed many times in the course of a day, and which was used by anyone on board the DB-21 who had business in the ship's storeroom. The sole witnesses to this event was John Rutledge, Jr., who testified in person at trial.

The stairway was constructed of expanded metal, which is a non-skid surface used in ship construction designed to keep debris from accumulating on walkways. The landing, midway between the top and bottom set of stairs, is constructed of checker plate, another type of non-skid surface. The stairs had a slight dent in them at the time of the accident, probably from someone dragging equipment down them. This was known to Schexnider, who claims, when starting down the stairs with Rutledge behind him, he turned and warned Rutledge about the dent (Tr., Vol. III, pp. 439-442).

At trial, Schexnider very deliberately described his fall occurring as follows:

> THE WITNESS: I put my left foot on the top tread. Then I put my right foot on the top tread, and then got ready to take a step with my left foot, and that's when I slipped.
>
> THE COURT: Take a step with the left foot?
>
> THE WITNESS: Right.
>
> THE COURT: And what, then what did you say next?
>
> THE WITNESS: Then I slipped. And that's whenever I fell down to the bulkhead.

Schexnider recounts in his testimony conversations with several other crewmembers, none of whom supports

his testimony. See, for example, Schexnider's description of the oily condition of the stairs (Tr., Vol. III, pp. 441-442) versus engineer George Renninger's description of the passageway (Tr., Vol. IV, p. 704). Also, Rutledge, the eyewitness, testified the accident occurred under suspicious circumstances, and that Schexnider's fall was only a little harder than you would sit down at your dining room table (Tr., Vol. II, pp. 334-339; 360-363).

Schexnider also testified directly opposite testimony, and statements, given by him in the course of the case. This led to considerable confusion as to the specifics of how the accident occurred (Tr., Vol. III, pp. 538-550). At various times, Schexnider said there was hydraulic fluid on the steps, or there was not; that there was a puddle of fluid, or nothing; that the bent steps contributed to his accident, or they did not; that the stairs were well-lit, or dark; that the steps were grating, or checker plate; that he slipped with his left foot, or his right, or he didn't know which one; that the lines carrying hydraulic fluid to the tension machines used by the barge in its mission had a coupling right above his stairway, or that they did not; and other areas of disagreement.

In fact, the clear testimony of all witnesses with knowledge of the operations of the barge, including Ward, Carl, Lawson, and Renninger, as well as the logs and daily job reports of the vessel (Exhibits D-1, D-2), show clearly that, although there was a time when the area around the bottom of the steps was messy – during the installation of the tension machine – this situation was remedied at least by the 10th of April. Also, no hydraulic fluid would have been in the area, because the lines connecting the pumps on the machine with the fluid

reservoir were purged and tested with diesel fuel, or air, not hydraulic fluid (Tr., Vol. IV, p. 703)

In short, although Schexnider claims he fell as a result of oily, messy, bent steps, there is no evidence whatsoever in the record to support his claim. In fact, all the evidence, other than his testimony, proves the steps were clean and non-slippery at all times. No other witness, all of whom used the stairs frequently, had ever found them slippery or dirty to the point of danger, not even Schexnider (Tr., Vol. IV, p. 719), probably because Frank Ward, the man in charge, had a reputation for insistence when it came to cleanliness in the work area (Tr., Vol. IV, p. 723).

Immediately after his reported accident, Schexnider was able to traverse several stairways and several bulkheads on the vessel (Tr., Vol. III, pp. 552-555). He reported only a "tightening in [his] back." However, he took off work the next two days, and finally left the barge via helicopter for medical attention on the recommendation of Dr. Gus Celis, the ship medic. However, Dr. Celis wanted Schexnider to go in for x-rays, only. Instead, Schexnider went to Singapore. When he left, he took everything with him. When leaving, he demonstrated no symptoms of an injury, and in fact, was observed walking up the steps with a large suitcase, which he hefted over the side of the helipad. Frank Ward, who saw him do this, merely thought Schexnider was "leaving" (Tr., Vol. I, pp. 124-125).

His "leaving" would have been a surprise to no one. On the day *before* the reported accident, he asked his boss,

Superintendent Ronald Carl, what would happen if he decided to quit (Tr., Vol. II, p. 281-2):

> CARL: . . . He had expressed to me that if he could get his money or his airplane fare, he would be happy to go home . . . I said it would not be able to work out that way. It's not the company policy. . . .It would be an eight hour day, crewboat ride, and that would be it.

Following his arrival in Singapore and evaluation by physicians there, Schexnider had his contract "medically completed," which, by its terms, entitled him to plane fare home.

After arriving back in Louisiana, Schexnider sought medical treatment, and was, over the course of years, treated extensively. The surgical interventions conducted, however, could have been required as a result of his non-accident-related surgery in 1980, which was a significant medical problem. In fact, the only thing linking his treatment after the accident to the accident itself is Schexnider's testimony, and statements to physicians, about the onset of pain after his reported fall. The later surgical treatment, anterior and posterio-lateral fusions to the affected area, are sometimes done following wide, decompressive laminectomies, such as Schexnider had had for removal of his spinal tumor. In any case, the fusion operations, by testimony, left him with a 35 percent disability rating to the body as a whole, as opposed to the 30 percent rating following his tumor surgery (Tr., Vol. II, p. 247; pp. 302-307).

Schexnider, whose criminal record has been cleared up as a result of a pardon granted by Gov. Edwin Edwards, now works daily as a life insurance salesman

STATEMENT OF THE ARGUMENT

I. The "choice of law" in this case has been established by this Court's ruling in *Schexnider v. McDermott International, Inc.*, 817 F.2d 1159 (5th Cir. 1987). Therefore, Australian law must be followed. *White v. Murtha*, 377 F.2d 428 (5th Cir. 1967).

II. The decision of the trial court should not be disturbed on appeal as the findings of fact made by the judge are based on credibility determinations, and are not *"clearly erroneous."* Rule 52(a), F.R.C.P.; *Anderson v. City of Bessemer City, North Carolina*, 470 US 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

ARGUMENT

I. *This Court's prior ruling on choice of law is the law of the case.*

The present case is one of those where the preliminary skirmishes are more strategically important than the final battle.

This Court's ruling in *Schexnider v. McDermott International, Inc.*, 817 F.2d 1159 (5th Cir. 1987) was the first reported case where an American seaman was denied status under the Jones Act, 46 U.S.C. 688, due to the application of foreign law to the facts of his reported accident. The primary fact giving rise to that decision, which remains undisputed after a four-day trial, is the Australian registry of the vessel upon which-plaintiff was employed at the time of his injury.

No change in circumstances from the first hearing of this case are alleged by plaintiff, except to urge the stipulation entered by the parties as to the employers of those in supervisory positions on board the vessel (McDermott International, Inc., which was, at the time, a Belgian company); and, in the absence of an *introduced* charter party (even though the fact of charter by McDermott Southeast Asia, Pte., Ltd., was not disputed on first hearing), that "control" by such employees equates with a *pro hac vice* ownership vested in McDermott International, Inc.

The test to determine whether former rulings are to be applied as the "law of the case" is found in this Circuit in the decision of *White v. Murtha*, 377 F.2d 428 (5th Cir. 1967), in which the Court said:

> While the 'law of the case' rule is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, *unless* [1] the evidence on a subsequent trial was substantially different, [2] controlling authority has since made a contrary decision of the law applicable to such issues, or [3] the decision was clearly erroneous and would work manifest injustice. *White*, at 431-2.

Schexnider, in brief, makes no argument the evidence in this case is substantially different from what Judge Veron and this Court found it to be in rendering the prior decision. That decision remains in effect, and has not been modified in any way since rendered. It was not

clearly erroneous, as it followed two Supreme Court decisions regarding choice of law (*Hellenic Lines, Inc. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970) and *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953) and one, in plaintiff's favor, concerning *forum non conveniens* dismissal (*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).

The prior decision, which effectively removed plaintiff's Jones Act claim from consideration by the trial Court, remains, then, the law of the case. This rule of law has been followed in this Circuit in a wide variety of decisions, including a civil rights case (*Morrow v. Dillard*, 580 F. 2d 1284 (5th Cir. 1978); a breach of contract case (*Dickinson v. Auto Center Manufacturing Company*, 733 F.2d 1092 (5th Cir. 1983); and a regulatory lawsuit (*Louisiana Land & Exploration Co. v. F.E.R.C.*, 788 F.2d 1132 (5th Cir. 1986).

Therefore, this Court, as did the trial Court, must consider the standards of proof and causes of action under Australian law as provided to the Court by two Australian lawyers. The exception to this general rule is, defendants argue, with respect to the suggestion by plaintiff's retained Australian counsel that an Australian interests analysis would determine American law applies to any action brought pursuant to the employment contract (Tr., Vol. III, pp. 632-635).

Professor Crawford suggests Australian conflicts rules, which apparently place greater weight on place of contract than does American law, should be applied in determining the law of the case, and further, that any action based on the contract must be judged by American

law. This disregards the fact that this Court, in accord with the cases cited *supra*, has made its interest analysis interpretation of the law to be applied, and decided the insubstantial connection afforded Schexnider with the U.S. by virtue of his signing an employment contract here does not tip the balance in favor of U.S. law. Therefore, plaintiff's argument for the applicability of U.S. law based on this theory is an exercise in international tail-chasing which must not be given substance.

II. *Actions and Standards of Proof Under Australian Law*

Australian substantive law, arising, as it did, from common ancestry with U.S. common law, is not as foreign, perhaps, as the civil law of Louisiana when it comes to liability determinations. Both Australian experts agreed that the cause of action provided Schexnider is founded either in occupiers' or employers' liability, and in either circumstance, the burden of proof of the plaintiff must be discharged by a "balance of probabilities." (Tr., Vol. III, pp. 635-6; Exhibit D-15, Affidavit of John Snowden) In other words, the standard of proof under Australian law is "more probable than not."

The only disagreement between the parties with respect to Australian law is whether any cause of action is granted pursuant to any "implied" rights of action which may be assumed to exist pursuant to Louisiana law and the employment contract (Exhibit D-14). Professor Crawford agrees (Tr. Vol. III, p. 644) that, if applicable Louisiana law provides, for example, only a compensation remedy, "then Australian law would give effect to that."

Plaintiff argues Schexnider is a "foreign seaman," excluded from the scope of the Louisiana worker's compensation statutes, La. R.S. 23:1037, et seq. No such determination was made by the trial court, and defendants submit Schexnider is clearly outside the statute, which is intended, by its terms, to provide an exclusion for foreign seamen injured in Louisiana ports or waters.

This Court recognized, in *Dupre v. Otis Engineering Corp.*, 641 F.2d 229 (5th Cir. 1981), that Section 1037 of the compensation act, insofar as it classifies excluded employees as "seamen," mandates such a determination of status be made in accordance with U. S. Federal maritime law. In a footnote, the *Dupre* Court said:

> We are confident that the purpose of the seamen's exclusion in the Louisiana workmen's compensation law requires that the definition of seamen be coextensive with the definition for purposes of maritime remedies.
>
> *Dupre* footnote 4, p. 232

The U. S. Courts have determined Schexnider is not a seaman, under the traditional Jones Act remedies, but that his status is determined by the applicable Australian law. Both Australian lawyers agreed general, land-based employers' liability and/or occupiers' liability standards apply to this case. No proof has been put forward by appellant to secure "foreign seaman status," assuming such a creation exists, in Schexnider. Therefore, to the extent Schexnider, by virtue of his contract, comes under the workers' compensation law, he is barred from suit against his employer in tort. By the testimony of Professor Crawford, Australian law would enforce this provision.

III. *The Decision of the Trial Court Was Not Clearly Erroneous*

Whatever standard of law applies to this case necessarily requires proof of causation, and here plaintiff's claim fails dramatically. Regardless of plaintiff's arguments with reference to seaworthiness of the DB-21, and negligence of the shipowner or occupier, no convincing proof was brought forth connecting any condition of the vessel with Schexnider's fall.

On this point, the Trial Court concluded, on page 10 of its opinion:

> Schexnider's method of descending the stairs, slowly, deliberately, and one at a time while holding the rail was the safest method of forward descent and would minimize any possibility that the angle of the stairs or the slight indentations in the treads would have caused the fall. The court is not persuaded that any condition of the stairs or any other appurtenance of the vessel contributed to the plaintiff's accident. Nor is the court persuaded that any foreign substance was on the stairs or played a part in causing the fall. The cause of the fall remains a puzzlement . . .

Rule 52 (a), F.R.C.P., states:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due deference shall be given to the opportunity of the trial court to judge of the [sic] credibility of the witnesses.

Judge Veron had an opportunity to see every witness who testified on every material point, with the exception of Richard Lawson, whose testimony was merely corroborative of what others had said. Simply stated, he did not

believe plaintiff's version of the accident, assuming that version holds that an accident occurred due to dents, darkness, and oily stairs. Rather, he concluded, after hearing all the witnesses, the cause of the accident was "a puzzlement."

Defendants' evidence leads to the inevitable conclusion that there was no reason for an accident to have occurred, other than Schexnider's avowed wish to leave his employment under conditions which would, at a minimum, provide him with free airfare home, and a maximum, with a lucrative recovery in the event of a lawsuit. For defendants to prevail, it was not necessary for the trial judge to find explicitly that Schexnider set out to "stage" an accident. It was only necessary that he conclude defendants did nothing which provides a good explanation for such a fall, and that was the clear conclusion of the trial judge.

This Court is constrained from a contrary finding of fact by the rule of *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518, (1985) "even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently." And where, as here, the findings of fact hinge on credibility determinations, the admonition is even stronger:

> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said . . . [W]hen a trial judge's finding is based

> on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can *virtually never* be clear error. *Anderson*, at page 1512, 575. (emphasis added)

The clearly erroneous standard is applied exactly the same way in a maritime case (*Verdin v. C & B Boat Co., Inc.* 860 F.2d 150 (5th Cir. 1988).

Appellant's chief challenge to the credibility of the witnesses involved appears to be an allegation their testimony changed conveniently between depositions in Singapore in 1985, and trial in 1988. This is particularly alleged in the case of Frank Ward and Ron Carl, both of whom were deposed in Singapore at the instance of plaintiff.

Both made clear, however, that at the time they were deposed, they had no access to Exhibits D-1, D-2, and other documents showing the work performed at the time of Schexnider's claimed injury. Therefore, prior testimony concerning the mess that was made on the floor, and on the stairs, as a result of the changing out of the tension machines can only be judged in the context of the written records which they later had a chance to review. After hearing all the evidence on this point, the trial court concluded the tension machine installation was completed on or before April 10th. Schexnider's accident was April 12th. This was a clear, factual call by the trial court, supported both by documents and witnesses, and it is not "clear error."

Without the explanation of equipment installation, the record is devoid of why, on a set of stairs admittedly made of open grating, anyone would slip and fall. Thus, the "puzzlement" of the Court.

IV. *Conclusion*

Schexnider's case may be historic for its legal implications on matters collateral to the main point. It is eminently mundane otherwise.

Like many in this day and time, Schexnider was caught up in the decline of his chosen field. Unlike most, he couldn't afford to change professions, because his past, which he had worked so hard to hide, might be discovered. He was stuck, desperate, and needed a way out.

McDermott provided that way out. Schexnider took advantage of his condition, and his knowledge of the system, when he took that lowly job in Singapore.

He has failed utterly to prove entitlement to damages, because no assertions by him at this stage can overcome the facts. There was no reason for him to fall on those stairs, save an economic one. A careful reading of the trial judge's opinion shows he saw this, too.

That is why Schexnider's claim must fall under any system. To allow a recovery in the face of all the facts in this case would be wrong, whether in Louisiana or Australia.

Respectfully submitted,

WOODLEY, WILLIAMS, FENET,
PALMER, DOYLE & NORMAN

/s/ James B. Doyle
JAMES B. DOYLE
EDMUND E. WOODLEY
500 Kirby Street
Post Office Drawer EE
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has this day been forwarded to all counsel of record by depositing same in the U.S. Mail, postage prepaid and properly addressed.

Lake Charles, Louisiana, this 19th day of January, 1989.

/s/ James B. Doyle
JAMES B. DOYLE

APPENDIX F

John A. SCHEXNIDER and Allison Schexnider, Plaintiffs-Appellants,

v.

McDERMOTT INTERNATIONAL, INC., et al., Defendants-Appellees.

No. 88-4667

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

March 16, 1989.

Rehearing Denied April 11, 1989.

American seaman brought action against Panamanian corporation to recover for injuries sustained on Australian barge chartered to corporation's subsidiary. The United States District Court for the Western District of Louisiana, Earl E. Veron, J., dismissed, and seaman appealed. The Court of Appeals, 817 F.2d 1159, affirmed in part, reversed in part, and remanded. On remand, the District Court, following bench trial, entered judgment against seaman. Seaman appealed. The Court of Appeals held that: (1) the "law of the case" required the District Court to apply Australian law on remand, and (2) finding that seaman's fall was not caused by any condition of the stairs or any other appurtenance of the barge was not clearly erroneous.

Affirmed.

1. Federal Courts 917, 950

Decision of legal issue by appellate court establishes "law of the case" and must be followed in all subsequent

proceedings in the same case at both the trial and appellate level unless the evidence at subsequent trial was substantially different, the controlling authority has since made contrary decision of law applicable to issues, or decision was clearly erroneous and would work manifest injustice.

2. Federal Courts 950

After Court of Appeals affirmed district court's determination that Australian law governed American seaman's action against Panamanian corporation to recover for injuries sustained on Australian barge chartered to corporation's subsidiary, "law of the case" required that Australian law be applied by district court on remand.

3. Seamen 29(5.14)

Finding that seaman's fall on barge stairs was not caused by any condition of the stairs or any other appurtenance of the barge was not clearly erroneous, in action to recover for injuries sustained in the fall; district court had based its decision on assessment of credibility of witnesses.

Joseph J. Weigand, Jr., Weigand, Weigand & Meyer, Houma, La., for plaintiffs-appellants.

James B. Doyle, Edmund E. Woodley, Woodley, Williams, Fenet, Palmer, Doyle & Norman, Lake Charles, La., for defendants-appellees.

Appeal from the United States District Court for the Western District of Louisiana.

Before POLITZ, KING and SMITH, Circuit Judges.

PER CURIAM:

This appeal is the second time that the parties have appeared before this court. In their first visit, *see Schexnider v. McDermott Int'l, Inc.*, 817 F.2d 1159 (5th Cir.), *cert. denied*, ___U.S.___, 108 S.Ct. 488, 98 L.Ed.2d 486 (1987), John A. Schexnider ("Schexnider") appealed from the district court's dismissal of his suit against McDermott International, Inc., a Panama corporation, and McDermott, Inc. on *forum non conveniens* grounds. Schexnider was partly successful, and we reversed the district court's dismissal of his suit. We affirmed, however, the district court's determination that Australian law governed Schexnider's action and remanded the case to the district court for trial.[1] Following a bench trial, the district court entered judgment in favor of the defendants.

[1, 2] Schexnider appeals, arguing that the district court's findings of fact are clearly erroneous and that the district court should not have applied Australian law. Addressing the latter argument first, our earlier decision concerning this case decided the question of what law was to be applied at trial. The decision of a legal issue by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case at both the trial and appellate levels unless the

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[1] On remand, the district court issued two opinions, only one of which has been published. *See Schexnider v. McDermott Int'l, Inc.*, 688 F.Supp. 234 (W.D.La.1988) (denying defendant insurance company's motion for summary judgment).

evidence at a subsequent trial was substantially different, the controlling authority has since made a contrary decision of law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice. *See White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967). In support of his argument that the district court erred in applying Australian law, Schexnider cites no reason that was not fully considered by the panel that directed the district court to apply Australian law. We have, therefore, no basis for reversing the district court in its decision to apply Australian law.[2]

[3] We turn next to Schexnider's argument that the district court was clearly erroneous in its findings of fact relating to Schexnider's accident. Schexnider's complaint alleges that on April 12, 1981, he slipped in grease or hydraulic fluid that had been allowed to accumulate on a step of a stairway on the Derrick Barge 21 (the "barge"), on which he was employed as a storeman. At trial, the substance of Schexnider's testimony was that both the accumulated grease or hydraulic fluid and the dented

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[2] The relevant Australian law was established at trial through the testimony of two experts. The district court's opinion noted that "[t]he parties agree that under Australian law the basic cause of action is in ordinary common law negligence, with the plaintiff bearing the burden of proof by a preponderance of the evidence." Schexnider also alleged a cause of action for breach of an implied warranty to provide a safe place to work based on his contract of employment with McDermott International, Inc. The district court's decision with respect to causation, *infra*, obviated the necessity for deciding what law would govern such a claim and whether the claim actually lies.

treads in the center of the stairs[3] caused his accident. The district court's opinion carefully reviewed Schexnider's testimony, as well as the testimony of various other witnesses to the accident itself and to the respective conditions of the barge generally and the stairway specifically. The district court found that Schexnider's method of descending the stairs – slowly, deliberately, and one stair at a time while holding the rail – was the safest method of forward descent and would minimize any possibility that the angle of the stairs and the slight indentations which existed in the treads would have caused his fall. The district court concluded that:

> The court is not persuaded that any condition of the stairs or any other appurtenance of the vessel contributed to the plaintiff's accident. Nor is the court persuaded that any foreign substance was on the stairs or played a part in causing the fall. The cause of the fall remains a puzzlement, as the court cannot discern how, after both of the plaintiff's feet were on the top step and he was, for a split second, stopped, his right foot came to fly out from under him when he stepped off with his left. The plaintiff bore the burden of proof in this action, and he has not sustained it. The court finds that no fault or condition attributable to any of the defendants or to any of INA's insureds contributed to the fall.

On appeal, Schexnider focuses on discrepancies between the deposition testimony of the chief engineer and the captain of the barge and their testimony at trial.

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[3] Testimony was offered that the treads in the center of the stairs were dented, perhaps because someone had rolled something heavy down the center of the stairway.

At the trial, in Schexnider's view, these two witnesses "were repeatedly impeached with their deposition testimony and the written accident report." Schexnider argues, very simply, that "either the truth was told in the depositions or at trial." Clearly, the district court credited the testimony of the chief engineer and the captain at trial. When confronted with his prior, apparently conflicting deposition testimony at trial, each man explained that at the time of his deposition, which was three years after the accident, he was not given an opportunity to review the barge's records to determine the work being performed on the barge at the time of the accident. Further, deposition testimony concerning the accumulations of fluid and oil on the floor and stairway resulting from the installation of a tension machine did not conflict with trial testimony about the fluid- and oil-free nature of the floor and stairway on the date of the accident because the barge's records reflected that the installation of the tension machine had been completed on April 10th and the accident occurred on April 12th. The district court credited that explanation for the discrepancies between the deposition testimony of the two men and their trial testimony. The district court based its decision on its assessment of the credibility of the chief engineer, the captain and other witnesses. Determinations as to the credibility of witnesses are peculiarly within the province of the district court. Even if we were convinced, which we are not, that had we been sitting as the trier of fact, we would have weighed the evidence differently, our ability to reverse the district court's judgment on the basis that its findings of fact are clearly erroneous is extremely limited. As the Supreme Court said in *Anderson v. Bessemer City,*

470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Id.* 470 U.S. at 575, 105 S.Ct. at 1513.

We conclude that the district court's findings of fact are not clearly erroneous.

AFFIRMED.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4667

JOHN A. SCHEXNIDER and
ALLISON SCHEXNIDER,

Plaintiffs-Appellants,

versus

MCDERMOTT INTERNATIONAL, INC.,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Louisiana

ON PETITION FOR REHEARING

(April 11, 1989)

Before POLITZ, KING and SMITH, Circuit Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41
FOR STAY OF THE MANDATE

ENTERED FOR THE COURT:

/s/ Carolyn Denin King
United States Circuit Judge

APPENDIX H

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

JOHN A. SCHEXNIDER	*	
VERSUS	*	NUMBER 81-2358
MCDERMOTT, INTERNATIONAL, ET AL	*	DIVISION: LAKE CHARLES

Video deposition of WALTER R. HAZARD, taken on Thursday, October 3, 1985, in the offices of Messrs. Weigand, Weigand & Meyer, Attorneys at Law, 427 Gravier Street, New Orleans, Louisiana, 70130.

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BY: JAMES B. DOYLE, ESQUIRE

Also Present:

John A. Schexnider

Reported by: Julie Carroum, C.S.R.
Certified Shorthand Reporter

(p. 4) *S T I P U L A T I O N*

It is stipulated and agreed by and between Counsel that the deposition of WALTER R. HAZARD, is hereby

being taken pursuant to Notice under the Federal Rules of Civil Procedure for all purposes permitted under the law.

The formalities of reading, signing, sealing and certification are hereby waived. The party responsible for service of the discovery material shall retain the original.

All objections, except those as to the form of the questions and/or responsiveness of the answers, are reserved until the time of the trial of this cause.

* * *

Julie Carroum, Certified Shorthand Reporter, in and for the State of Louisiana, officiated in administering the oath to the witness.

(p. 5) WALTER R. HAZARD, 1010 Common Street, New Orleans, Louisiana, 70160, after having been first duly sworn, testified on his oath as follows:

AUDIO VISUAL TECHNICIAN:

> This is a predeposition statement. This is for the United States District Court, Western District, State of Louisiana, John A. Schexnider versus McDermott, International, Incorporated, et al, Civil Action 81-2358. This is the testimony of Mr. Walter R. Hazard taken pursuant to the Federal Rules of Civil Procedure for all purposes which the law may allow at 427 Gravier Street, New Orleans, Louisiana, 70130.
>
> Appearing in this action are Mr. Weigand, attorney for the plaintiff, and Mr. James B. Doyle, attorney for the defendant.

It is stipulated and agreed that the testimony of Mr. Walter Hazard is hereby being taken by an audio visual means. The (p. 5) stock of the Australian corporation, to your knowledge, is owned by McDermott International?

A You'd have to ask somebody else about that. I don't get involved with that sort of matter.

Q But at any rate, your office which is McDermott, Inc., is that correct?

A We are McDermott, Inc. And when we work on a vessel of a foreign company, we are paid by that company to work for them as would an outside company be paid.

Q Okay.

A We open a job number against that company, and we bill them for our services.

Q Ail right. Now you stated, I believe, that the flag of that vessel, the DB 21, is for convenience. Now, did you use that word?

MR. DOYLE:

I object to that.

THE WITNESS:

I don't think I did, no.

BY MR. WEIGAND:
